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No. 199

# In the Supreme Court of the United States

OCTOBER TERM, 1930

DAVID BURNET, COMMISSIONER OF INTERNAL REVENUE, PETITIONER

*v.*

SAMUEL F. HOUSTON

*ON A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT*

## BRIEF FOR THE PETITIONER

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*v.*

SAMUEL F. HOUSTON

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## BRIEF FOR THE PETITIONER

### OPINIONS BELOW

The opinion of the Circuit Court of Appeals (R. 56) is reported in 39 F. (2d) 351. The findings of fact and the opinion of the Board of Tax Appeals (R. 9–16) are reported in 13 B. T. A. 279.

### JURISDICTION

The judgment of the Circuit Court of Appeals was entered March 14, 1930. (R. 63.) Petition for certiorari was filed in this Court on June 14,

1930, and was granted October 13, 1930. (R. 64.) The jurisdiction of this Court rests on Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

## QUESTION PRESENTED

Was it incumbent upon the respondent to establish the March 1, 1913, value of his property right acquired prior to that date, to support a claim for a deductible loss on the disposition of such property in 1920?

## STATUTES AND REGULATIONS INVOLVED

The statutes and regulations involved are printed in the Appendix, *infra*, pp. 18–20.

## STATEMENT

This case reached the Circuit Court of Appeals for the Third Circuit in the petition of Samuel F. Houston, respondent herein, for a review of the decision of the Board of Tax Appeals determining a deficiency in respondent's income tax for the calendar year 1920.

The facts as found by the Board of Tax Appeals are as follows (R. 10–14):

The respondent was a stockholder and director of the Real Estate Trust Company of Philadelphia, a banking institution. The Trust Company closed its doors in the year 1906, and on August 28 of that year George H. Earle, Jr., was appointed receiver. The financial embarrassment of the Trust Com-

pany was brought about by the improper conduct of its affairs by its president, Frank Hipple. Hipple loaned excessive amounts to one Adolph Segal, and took therefor collateral which could not be easily liquidated, but which was not without value.

The receiver for the Trust Company evolved a plan for reorganization which included as one of its provisions the creation of a fund of $2,500,000 from subscriptions by directors of the company. The company was to be given the $2,500,000 outright, and the subscribers were to be reimbursed, if at all, by all of the excess over $3,000,000 which might be realized from the "Segal Matters." This plan of reorganization became effective, and the subscribers to the $2,500,000 fund made their subscriptions with the understanding that if, from the administration of the "Segal Matters," $3,000,000 should be realized, the subscribers were to receive any excess over this amount which might be realized from the same. No restrictions or time limits were placed upon the Trust Company in regard to its administration and final disposition of the assets available to the Trust Company in the "Segal Matters."

The Trust Company resumed business on November 1, 1906, and thereafter and until December 30, 1920, the "Segal Matters" were administered exclusively by it under the direction of George H. Earle, Jr., formerly receiver and thereafter president of the company.

The respondent contributed $755,000 to the fund. Of this amount he contributed $305,000 personally, and the balance was contributed on behalf of his mother and his sisters.

The respondent, at the time he subscribed to the guaranty fund, believed that the "Segal Matters" had considerable potential value, which, under Earle's administration, could be converted into a sufficient amount of cash to repay the subscribers the amount of their subscriptions with interest, and possibly some profit in addition. A suit against the American Sugar Refining Company under the Sherman Antitrust Act was contemplated on behalf of the Pennsylvania Sugar Refining Company, and the value of the "Segal Matters" depended to some extent upon the successful prosecution of such a suit. Suits were brought for $10,000,000, and in January, 1910, the litigation was compromised upon the delivery to the Trust Company, by the American Sugar Refining Company, of certain bonds wrongfully withdrawn from the Trust Company, among which were bonds of the Pennsylvania Sugar Refining Company. The Trust Company afterwards converted the latter bonds, through a foreclosure, into 7,268 shares of stock in a reorganized company, thereafter called the Pennsylvania Sugar Company. This was on or before January 22, 1912.

Some question arose between the parties in regard to their rights under the subscription agreement, including the right to interest, and on May

5, 1916, a supplemental agreement was entered into. At this time, and for some time prior thereto, the principal unliquidated asset of the original "Segal Matters" was the 7,268 shares of stock in the Pennsylvania Sugar Company, and under the supplemental agreement it was provided that when this stock was disposed of the contributors to the guaranty fund should receive one-fourth of the proceeds.

In the latter part of 1920 the parties concerned, after full investigation, concluded that the liquidation agreement had rendered its maximum of service, and that the remaining Segal assets would not have any greater value during a substantial period of time in the future than they then had. Thereupon the subscribers, either individually or by their duly constituted representatives, entered into separate agreements which as a group provided for complete liquidation of the "Segal Matters" by the Trust Company. Distribution of one-fourth of the 7,268 shares of the Pennsylvania Sugar Company stock was made to the subscribers to the fund in proportion to the amount of their subscriptions in full satisfaction and discharge of their interest in the "Segal Matters." The subscribers never received any other return on their subscriptions.

The respondent entered into such an agreement on December 30, 1920, and on that date, in accordance with the terms of the agreement, received 548.734 shares of Pennsylvania Sugar Company stock. He personally was entitled to 222 of these

shares. The remaining shares he received as the agent for his sisters and others who had subscribed through him.

At the time of such distribution each share of stock of the Pennsylvania Sugar Company had a fair market value of $150.

At the end of 1920 the respondent wrote off his books as a loss $271,700, computed by deducting the value of the stock which he received from $305,000, the amount of his subscription. In reporting his income for 1920, he deducted this amount as a loss.

The Commissioner of Internal Revenue disallowed the deduction and found a deficiency in tax of $191,830.53. The respondent appealed to the Board of Tax Appeals. The Board sustained the action of the Commissioner, holding that the loss, if any, would be the difference between what was received in 1920 for the property right and its cost or March 1, 1913, value, whichever was lower, and that since no effort was made by the respondent to show the March 1, 1913, value of the right in question, no deductible loss was established. The respondent filed a petition with the Circuit Court of Appeals for the Third Circuit, for a review of the decision of the Board (R. 16), and on March 14, 1930, the Circuit Court of Appeals reversed the Board's decision, on the ground that the respondent's loss was the difference between the cost of the right in 1906 and the amount realized in 1920 (R. 56–63).

## SPECIFICATION OF ERRORS TO BE URGED

The court below erred—

1. In failing to hold that only those losses are deductible from gross income which are sustained after March 1, 1913;

2. In failing to hold that the ascertainment of the March 1, 1913, value was necessary for the purpose of apportioning the total loss between the periods before and after March 1, 1913;

3. In holding that the deductible loss was the difference between the cost of the taxpayer's property right in 1906 and the amount realized in 1920, there being no evidence that any portion of said loss had been sustained subsequent to March 1, 1913;

4. In failing to hold that the burden was upon the respondent to prove the March 1, 1913, value of his property right to support a claim for a deductible loss;

5. In holding that under the facts in this case respondent was relieved of the necessity of establishing the March 1, 1913, value of his property right.

## SUMMARY OF ARGUMENT

The respondent is entitled to deduct only the loss which accrued after March 1, 1913. Section 202 of the Revenue Act of 1918 expressly provides that the basis for determining loss on the sale of property acquired before March 1, 1913, shall be "the fair market price or value of such property

as of that date." The decisions of this Court establish that when property acquired before March 1, 1913, is sold after that date the basis for determining loss is the cost price, or the value on March 1, 1913, whichever is lower. A determination of the March 1, 1913, value of the respondent's property is, therefore, an essential prerequisite to the determination of a deductible loss.

The burden of proving the March 1, 1913, value was on the respondent. The respondent made no effort to establish the value of his right on that date and consequently failed to meet the burden. Furthermore, the record affirmatively shows that the respondent's property had no value on March 1, 1913, and that all the loss incurred by him accrued prior to that date.

## ARGUMENT

### I

### THE RESPONDENT IS ENTITLED TO DEDUCT ONLY THE LOSS WHICH ACCRUED AFTER MARCH 1, 1913

The Circuit Court of Appeals held that the respondent in 1906 entered into a transaction for profit as a result of which he acquired certain property interests; that he disposed of those interests in 1920 at less than the cost; and that he is entitled to deduct for tax purposes the entire difference between his 1906 cost and his 1920 receipts, even though the value of his interests on March 1, 1913, was not determined. We contend that the decision

is erroneous because it fails to recognize that the respondent could deduct only that portion of his loss which he incurred subsequent to March 1, 1913, and that, consequently, the ascertainment of the March 1, 1913, value of his property was necessary in order to determine the amount of the loss which had occurred subsequent to that time.

The taxpayer must find in the statute the authority for taking a deduction. See *Anderson* v. *Forty-Two Broadway Co.*, 239 U. S. 69. In the present case the statute is explicit and by its terms requires that only the difference between the selling price and the value of the property on March 1, 1913, may be deducted as a loss. Section 202 (a) (1) of the Revenue Act of 1918 (*infra*, p. 18) provides—

> That for the purpose of ascertaining the gain derived or loss sustained from the sale or other disposition of property, real, personal, or mixed, the basis shall be—
>
> (1) In the case of property acquired before March 1, 1913, the fair market price or value of such property as of that date; * * *

Article 1561 of Regulations 45, as amended by Treasury Decision 3206 (*infra*, pp. 19–20), promulgated under this section applies to the present situation directly. That article provided that—

> in the case of property acquired before March 1, 1913, when its fair market value as

> of that date is lower than its cost, the deductible loss is the excess of such fair market value over the amount realized therefor.

This Court has had occasion to consider this provision of the Revenue Act of 1918, or the similar provisions of earlier statutes in several cases. In *Goodrich* v. *Edwards*, 255 U. S. 527, which arose under the Revenue Act of 1916, it appeared that property was sold in 1916 for less than it had cost in 1912 but for more than its value on March 1, 1913. This Court held that "since no gain was realized on this investment by the plaintiff in error no tax should have been assessed against him." In *Walsh* v. *Brewster*, 255 U. S. 536, it was held that when the cost price was greater than the value on March 1, 1913, the taxable income on a sale after that date at an actual profit was the excess of the sale price over the cost price.

In *United States* v. *Flannery*, 268 U. S. 98, it was held that these decisions were applicable to losses as well as to gains. This Court said (p. 103):

> These decisions are equally applicable to the Act of 1918 * * *. As it was held in these decisions that the Act of 1916 imposed a tax to the extent only that gains were derived from the sale, and that the provision as to the market value of the property on March 1, 1913, was applicable only where a gain had been realized over the original capital investment, so we think it should be held that the Act of 1918 imposed a tax and allowed a deduction to the extent only that

> an actual gain was derived or an actual loss sustained from the investment, and that the provision in reference to the market value on March 1, 1913, was applicable only where there was such an actual gain or loss, that is, that *this provision was merely a limitation upon the amount of the actual gain or loss that would otherwise have been taxable or deductible.* (Italics ours.)

In *Heiner* v. *Tindle*, 276 U. S. 582, it appeared that in 1901 the taxpayer leased property which had formerly been his residence, thus devoting the property to a transaction entered into for profit. The property was sold in 1920 for a sum considerably less than its value on March 1, 1913. The value of the property in 1901 did not appear. The taxpayer sought to deduct the difference between the March 1, 1913 value and the selling price as a loss, but this Court held (p. 587):

> The cause should be remanded for a new trial so that the value of the property as of October 1, 1901, when rented, may be found. If that value is larger than the value of March 1, 1913, the deduction made below should be allowed; if less, only the difference, if any, between its then value and the sale price should be allowed.

This Court thus directed that when the cost was greater than the March 1, 1913, value, the latter value should be taken as the basis for deducting a loss.

We believe that these decisions establish the rule that under the Revenue Act of 1918 the basis for determining loss arising from the sale of property acquired before March 1, 1913, is the cost or the value on March 1, 1913, whichever is lower. Although there is apparently no decision of this Court in which it appeared that the March 1, 1913, value was lower than the cost price, this situation is expressly covered by the precise terms of the statute. The Circuit Courts of Appeals, other than the court below, have uniformly held that when the value on March 1, 1913, is less than the cost, only the difference between the March 1, 1913, value and the sale price may be deducted as a loss. *Ayer* v. *Blair*, 26 F. (2d) 547 (Ct. of App. D. C.); *Nichols* v. *Smith*, 35 F. (2d) 938 (C. C. A. 1st); *Bloch* v. *Commissioner*, 42 F. (2d) 1013 (C. C. A. 4th), affirming *per curiam*, 16 B. T. A. 425. See also *Holmquist* v. *Blair*, 35 F. (2d) 10 (C. C. A. 8th).[1]

In the case at bar the respondent, by making his contribution in 1906, acquired a right to share in the excess proceeds from the liquidation of the "Segal Matters"; this right was property in the nature of a chose in action; it was subject, as the lower court has said (R. 62), "to disposition through testacy, intestacy, and sale." In 1920 he

[1] See also the opinion of the Attorney General to the Secretary of the Treasury in 33 Op. Atty. Gen. 291, 297, where it was held that—

"No taxable gain or allowable loss resulted if the selling price was greater than the value of the property on March 1, 1913, but less than the cost thereof."

converted his right into "money or money's worth" having a value less than cost, and he suffered thereby an actual loss. If the amount which he finally realized was in excess of the March 1, 1913, value of his property no loss may be deducted for the reason that all of the loss would then be attributable to the period prior to March 1, 1913. If the March 1, 1913, value was less than the 1906 cost but more than the amount realized the deductible loss would be the excess of the March 1, 1913, value over the amount realized, that being the only portion of the loss attributable to the period subsequent to March 1, 1913. A determination of the March 1, 1913, value of respondent's property is therefore an essential prerequisite to the determination of a deductible loss. The basis used by the lower court ignores the statutory limitation upon the amount of the actual loss which is deductible and results in the allowance of a loss which may have been sustained either partially or wholly prior to March 1, 1913.

## II

### THE RESPONDENT FAILED TO MEET THE BURDEN OF PROVING THE MARCH 1, 1913, VALUE

The court below states that to determine the true or approximate value of the property in question on March 1, 1913, was a "sheer impossibility" because such property had no fair market value, no ascertainable intrinsic value, and no calculable tax

value. (R. 62.) This conclusion is unwarranted. We believe that the record affirmatively shows that respondent's property right had no value on March 1, 1913. In any event the value on that date, if any, was reasonably determinable. On March 1, 1913, the principal unliquidated asset of the original "Segal Matters" was 7,268 shares of stock in the Pennsylvania Sugar Company. The record does not disclose what the other "Segal Matters" were in addition to this stock, but it is evident that such securities were of minor importance and value. (R. 13, 48, 50–51, 52, 58.) Full information as to the securities other than the stock was available to respondent in the form of a statement by the trust officer of the Trust Company (R. 47), but such statement was not made a part of the record. The assumption is justified therefore that on March 1, 1913, the only unliquidated asset in which the respondent and his associates were materially interested was the 7,268 shares of stock in the Pennsylvania Sugar Company. The value of that stock in 1920 was stipulated to be $150 per share. (R. 22.) No reason appears why its value as of the earlier date of March 1, 1913, could not have been reasonably determined and the value of respondent's contingent right therein, if any, established. In *Heiner* v. *Tindle, supra,* this Court remanded the cause for a new trial so that the value of a dwelling house might be found as of the date when taxpayer ceased to oc-

cupy it as a residence and rented it to others, which date was prior to March 1, 1913. The value of the property as of March 1, 1913, was found, and this Court held that the ascertainment of the market value of the property as of the earlier date "would not seem to involve any greater administrative difficulty than the ascertainment of market value on March 1, 1913" (p. 586).

It was necessary, therefore, that respondent establish the March 1, 1913, value of his right in order to measure the loss sustained after that date. The respondent, however, relied upon a different basis for measuring the amount of his loss, and made no effort to show the value of his right on March 1, 1913. Difficulty in establishing such value did not relieve respondent of his burden. *Cf. Lucas* v. *Alexander*, 279 U. S. 573, p. 579; *United States* v. *Ludey*, 274 U. S. 295, 302. He failed to bring himself within the statute or to meet the burden which rested on him to show that he was entitled to the deduction denied him by the Commissioner. *Botany Mills* v. *United States*, 278 U. S. 282; *Reinecke* v. *Spalding*, 280 U. S. 227.

The property right which the respondent had on March 1, 1913, was his share of the excess value of the "Segal Matters" over the then unliquidated balance of the $3,000,000 impaired capital and surplus. On March 1, 1913, the Trust Company had not recouped all of the $3,000,000 impaired capital and surplus to which the proceeds of the administration and sale of the "Segal Matters" were to

be devoted before distribution of any excess. The report of the directors' committee of February 11, 1915, signed by this respondent, discloses that as late as 1915 there remained approximately $1,300,000 of the surplus of the company which had not yet been made whole out of the "Segal Matters." (R. 47.) If the unliquidated surplus amounted to $1,300,000 in 1915 it is obvious that at least that amount was unliquidated on March 1, 1913. On March 1, 1913, therefore, the value of respondent's property right was represented by the difference in the value of the 7,268 shares of the Pennsylvania Sugar Company stock and at least $1,300,000 still due the Trust Company. From the same report (R. 48) it appears that at that time the Pennsylvania Sugar Company stock did not have an actual value sufficient to extinguish the deficiency in the Trust Company's capital and surplus to which it was pledged. The stock would have to have had a value of approximately $179 per share to equal the $1,300,000 it was pledged to cover. As the value of respondent's property right on March 1, 1913, represented only his share of the excess value of this stock over and above the deficiency charged against it, it is fairly inferable that his property right on that date had no value whatever. Therefore none of the loss which respondent sustained accrued after March 1, 1913.

## CONCLUSION

The decision of the Circuit Court of Appeals for the Third Circuit should be reversed.

Respectfully submitted.

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FEBRUARY, 1931.

# APPENDIX

## STATUTES AND REGULATIONS INVOLVED

The Revenue Act of 1918, c. 18, 40 Stat. 1057, 1060, 1066, 1067, provides in part as follows:

> SEC. 202. (a) That for the purpose of ascertaining the gain derived or loss sustained from the sale or other disposition of property, real, personal, or mixed, the basis shall be—
>
> (1) In the case of property acquired before March 1, 1913, the fair market price or value of such property as of that date; and
>
> (2) In the case of property acquired on or after that date, the cost thereof; * * *.
>
> SEC. 214. (a) That in computing net income there shall be allowed as deductions:
>
> * * * * *
>
> (5) Losses sustained during the taxable year and not compensated for by insurance or otherwise, if incurred in any transaction entered into for profit, * * *.

Treasury Regulations 45, promulgated December 29, 1919, under the Revenue Act of 1918, provided in part as follows:

> ART. 1561. *Basis for determining gain or loss from sale.*—For the purpose of ascertaining the gain or loss from the sale or exchange of property the basis is (a) its fair market price or value as of March 1, 1913, if acquired prior thereto, or (b) if acquired

on or after that date, its cost or its approved inventory value. In both cases proper adjustment must be made for any depreciation or depletion sustained. What the fair market price or value of property was on March 1, 1913, is a question of fact to be established by any evidence which will reasonably and adequately make it appear. As to inventories see section 203 of the statute and articles 1581–1588. The fair market value as of March 1, 1913, has no bearing on the determination of the invested capital of a corporation for the purpose of war profits and excess profits tax. See section 326 and article 831.

Article 1561 of Treasury Regulations 45 (1920 ed.), promulgated January 28, 1921, is the same as Article 1561 of Regulations 45 (1919 ed.) set out above.

Article 1561 of Regulations 45 (1920 ed.) was amended by Treasury Decision 3206, promulgated July 28, 1921, which reads in part as follows:

TREASURY DEPARTMENT,
OFFICE OF COMMISSIONER OF
INTERNAL REVENUE, *Washington, D. C.*

*To collectors of internal revenue and others concerned:*

Articles * * * 1561 * * * of Regulations No. 45 (1920 ed.) are hereby amended in order that the rule announced by the Supreme Court in the cases of Goodrich v. Edwards and Brewster v. Walsh, respecting the basis for the determination of taxable gain or deductible loss in the case

of property acquired prior to March 1, 1913, and sold or disposed of subsequent thereto, may be incorporated therein. The amendments are merely for the purpose of such incoropration and make no attempt to correct any of the regulations in any respect other than the one necessitated by those cases. The amendments are as follows:

* * * * *

ART. 1561. *Basis for determining gain or loss from sale.*—For the purpose of ascertaining the gain or loss from the sale or exchange of property the basis is the cost of such property, or if acquired on or after March 1, 1913, its cost or its approved inventory value. But in the case of property acquired before March 1, 1913, when its fair market value as of that date is in excess of its cost, the gain which is taxable is the excess of the amount realized therefor over such fair market value. Also in the case of property acquired before March 1, 1913, when its fair market value as of that date is lower than its cost, the deductible loss is the excess of such fair market value over the amount realized therefor. No gain or loss is recognized in the case of property sold or exchanged (a) at more than cost but at less than its fair market value as of March 1, 1913, or (b) at less than cost but at more than its fair market value as of March 1, 1913. In any case proper adjustment must be made for any depreciation or depletion sustained. What the fair market value of property was on March 1, 1913, is a question of fact to be established by any evidence which will reasonably and adequately make it appear. As to inventories see section 203 of the statute and articles 1581–1588. The

fair market value as of March 1, 1913, has no bearing on the determination of the invested capital of a corporation for the purpose of the war profits and excess profits tax. See section 326 and article 831.

* * * * *

D. H. BLAIR,
*Commissioner of Internal Revenue.*

Approved July 28, 1921.

A. W. MELLON,
*Secretary of the Treasury.*

U. S. GOVERNMENT PRINTING OFFICE: 1921